SUPREME COURT, U.S.
FILED
JAN 10 1972
E. ROBERT SEAVER, CLERK

In The

SUPREME COURT of the UNITED STATES

October Term 1971

No. 71-896

STEVEN A. LOZOFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner STEVEN A. LOZOFF prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in the above-entitled case on Decembr 9, 1971.

Citation To Opinion Below

The opinions below are not reported. The memorandum and order of the United States Court of Appeals for the First Circuit is set forth in the Appendix, infra, pp. 1a-3a. The statement of the United States District Court for the District of Massachusetts at the time of senencing of petitioner is printed in the Appendix, infra, pp. 4a-5a.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on December 9, 1971. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Section 1254(1).

Questions Presented for Review

1. Whether a trial court can, consistent with due process of law, properly impose a sentence of imprisonment based solely on an alleged deterrent factor to the exclusion of all other factors in determining such a sentence.

2. Whether a trial court can, consistent with due process of law, properly impose a sentence of imprisonment based on an alleged detefrent factor when there was strong evidence that incarceration would not and did not serve as a deterrent to others from engaging in similar activities.

Constitutional Provision and Statutes Involved

(1) The Fifth Amendment of the United States Constitution.

(2) The statute under which petitioner was prosecuted, convicted and sentenced was Section 331(q) (2), Title 21, United States Code.

(3) Petitioner sought to review the sentence imposed pursuant to Rule 35 of the Federal Rules of Criminal Procedure, which provides as follows:

> The Court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The Court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the Court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of an order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The Court may also reduce a sentence upon revocation of probation as provided by law.

Statement of the Case

The petitioner was indicted on April 23, 1970, and was charged with two counts of sale of lysergic acid diethylamide in violation of Section 331(q) (2), Title 21, United States Code, and two counts of unlawful transfer of marijuana in violation of Section 4742(a), Title 26, United States Code. After originally entering a plea of not guilty to all counts, the petitioner withdrew his not guilty pleas and entered pleas of guilty to the charges under Section 331 (q) (2). The Government requested leave to dismiss the other counts against the petitioner. Upon the guilty pleas, the District Court ordered a presentence investigation and scheduled sentencing for April 5, 1971.

The petitioner appeared for sentencing on the scheduled date and, in addition to the presentence report prepared by the United States Probation Department, testimony was adduced on behalf of the petitioner from two psychiatrists who had treated the petitioner for his mental illness. Doctor Margaret Goldman testified the petitioner was first seen by her in June, 1969, and that she then started intensive psychotherapy with petitioner. She testified that petitioner's childhood was marked by a disruptive homelife; that he was a compulsive eater by the age of 5; that he was receiving psychiatric treatment by the age of 10. Petitioner's emotional disturbance continued. At the age of 12 he discovered his mother in an unsuccessful suicide attempt for which she was institutionalized for over a year. Doctor Goldman testified that petitioner's emotional problems continued and manifested themselves in a number of symptoms.

After some period of treatment, Doctor Goldman concluded that psychotherapy on an outpatient basis was becoming dangerous to petitioner and recommended in Autumn of 1970 that he enter a sanitarium for continued intensive psychotherapy on an in-patient basis. Doctor Goldman concluded that in her opinion petitioner was in need of "very intensive psychotherapy in a place where everybody basically is psychiatrically aware, . . . for 24 hours' availability".

A second psychiatrist, Doctor William Lorton, testified that he was a staff psychiatrist at the sanitarium at which petitioner was a patient at the time of sentencing. Doctor Lorton testified that he basically concurred with the diagnosis of Doctor Goldman. He further testified that he had formerly been a clinical consultant to the Wisconsin State Prisons and that the bulk of psychiatric treatment in penal institutions is group therapy. Doctor Lorton expressed his opinion that such treatment would be helpful to petitioner, but in his view not sufficient.

The petitioner made a statement in mitigation of sentence wherein he said he recognized he had acted improperly when he had become involved with drugs. He indicated, and the Court had been provided with corroborating letters, he was actively participating in programs counseling young people and avoiding contact with the drug scene.

The District Court then sentenced the petitioner to the custody of the Attorney General for a period of five (5) years. In explaining the reasons for the sentence imposed, the Court stated:

> My reasons are principally that the defendant's rehabilitation is a subsidiary consideration for this Court in this type of case. It would be far better for Mr. Lozoff and for his family and for all the persons who are concerned with his welfare to have him rehabilitated. But the need in this type of offense, in the Court's opinion, is primarily for the deterrence of other persons who are tempted to get involved in this horrendous traffic in LSD and similar narcotics. (App. pp. 1a-2a).

The Court also indicated it felt deterrence was not effective in many areas of the criminal law, but that it was effective in the area of narcotics. As to the petitioner's psychiatric and emotional condition the Court stated:

> It is unfortunate that someone simply has to be made an example of not because it is going to do you any good, not because it is going to do defendants any good. In fact, there is a danger that it will do you harm, permanent harm in your life. (App. p. 2a).

Subsequently, in May, 1971, the petitioner wrote the District Court a letter which the Court treated as a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. Based on its review of the presentence report, the request was denied. Later, on July 29, 1971, petitioner, now represented by counsel, filed another motion for reduction of sentence. In the motion, the petitioner requested an evidentiary hearing in support of his motion.

In support of the motion, petitioner attached an affidavit from Doctor Seymour Halleck, a psychiatrist of long experience in dealing with prison inmates. Based on his

training and experience in the areas of psychiatry, corrections and criminology, Doctor Halleck concluded as follows:

1. Young persons arrested and charged with the use of or sale of narcotic or dangerous drugs do not benefit from incarceration.

2. Punishment of young persons charged with the sale or use of narcotic or dangerous drugs does not serve as a deterrent to other young persons from engaging in similar activities.

Doctor Halleck set forth the reasons for his conclusions in an affidavit filed in support of the motion for reduction. Petitioner also submitted to the Court a letter from Doctor Norman Zinberg, an assistant professor of psychiatry at the Harvard Medical School with extensive experience in dealing with young people involved in the use of narcotic and dangerous drugs.

Doctor Zinberg stated that incarceration seems merely to confirm and give incentive to a young person's own sense of deviance, rather than acting as a deterrent.

On August 3, 1971, the District Court entered an order denying the motion for reduction of sentence and denied the request for an evidentiary hearing in support of the motion.

Petitioner thereupon appealed to the United States Court of Appeals for the First Circuit from the denial of his motion for reduction of sentence made pursuant to Rule 35 of the Federal Rules of Criminal Procedure. As part of that appeal, petitioner sought to have the pre-

sentence report made a part of the record on appeal. This request was denied by the District Court and by the Court of Appeals. The case was argued before the Court of Appeals on December 6, 1971, and the Court of Appeals affirmed the judgment of the District Court on December 9, 1971.

REASONS FOR GRANTING THE WRIT

This petition raises substantial questions in a complex and challenging area of criminal justice administration: sentencing. The dispensation of justice does not end with the adjudication of guilt. The imposition of a criminal sanction and the sentencing procedure utilized by the trial court is subject to scrutiny under the Due Process Clause. *Williams v. New York*, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). Both the National Commission on Reform of Federal Criminal Laws, *A Proposed New Federal Criminal Code*, p. 311 (1971) and the American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Appellate Review of Sentences* (Approved Draft, 1968), recommend appellate review of sentencing decisions. Similarly, state courts are approving the concept of appellate review of the sentencing decision. *McCleary v. State*, 49 Wis. 2d 263, 182 N. W. 2d 512 (1971). Finally, a growing number of states provide for such review by statute. See "Appendix A—Review Statutes" in the A. B. A. Project on Minimum Standards of Criminal Justice, *Standards Relating to Appellate Review of Sentences*, p. 67 (Approved Draft, 1968).

Since *Williams v. New York*, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949), courts have recognized the requirement of individualized sentencing, that the punishment be suited to the offender rather than the offense. The district court has a duty to impose an appropriate sentence. *United States v. Daniels*, — F. 2d —, 4 S. S. L. Rptr. 3333 (C. A. 1971). Failure to individualize properly has caused appellate courts to set such sentences aside. *Commonwealth v. Green*, 396 Pa. 137, 151 A. 2d 241 (1959); *United States v. Daniels*, supra.

In approving the concept of individualized sentencing in *Williams v. New York*, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949), the Supreme Court cited with approval four factors which a trial court should consider in imposing sentence: one, the protection of society against wrongdoers; two, the punishment or the discipline of the wrongdoer; three, the reformation and rehabilitation of the wrongdoer; four, the deterrence of others from the commission of like offenses.

Since the *Williams* decision, legal scholars and courts have considered the appropriate criteria involved in the sentencing decision. The Circuit Courts of Appeals for the District of Columbia and the Ninth Circuit have adopted standards and policies for sentencing pursuant to Section 334, Title 28, United States Code. See Ninth Circuit Institue on Sentencing, 27 FRD 287 (1961). More recently, the American Bar Association Project on Minimum Standards for Criminal Justice and the National Commission on Reform of Federal Criminal Laws have set forth proper sentencing criteria. The A. B. A. Project concluded that

most sentences presently imposed are excessive and recommends:

> The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant. Section 2.2, A. B. A. Standards, "Sentencing Alternatives and Procedures", p. 14.

The final report of the National Commission on Reform of Federal Criminal Laws, in *A Proposed New Federal Criminal Code*, recommends that the following criteria be considered in imposing sentence in federal trial courts:

> (1) *Criteria.* The court shall not impose a sentence of imprisonment upon a person unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant, it is satisfied that imprisonment is the more appropriate sentence for the protection of the public because:
>
> (a) there is undue risk that during a period of probation the defendant will commit another crime;
>
> (b) the defendant is in need of correctional treatment that can most effectively be provided by a sentence to imprisonment under Chapter 32; or
>
> (c) a sentence to probation or unconditional discharge will unduly depreciate the seriousness of the defendant's crime, or undermine respect for law.
>
> (3) *Factors to be Considered.* The following factors, or the converse thereof where appropriate, while not controlling the discretion of the court, shall be accord-

ed weight in making the determinations called for by subsection (2):

(a) the defendant's criminal conduct neither caused nor threatened serious harm to another person or his property;

(b) the defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property;

(c) the defendant acted under strong provocation;

(d) there were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct;

(e) the victim of the defendant's conduct induced or facilitated its commission;

(f) the defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained;

(g) the defendant has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(h) the defendant's conduct was the result of circumstances unlikely to recur;

(i) the character, history and attitudes of the defendant indicate that he is unlikely to commit another crime;

(j) the defendant is particularly likely to respond affirmatively to probationary treatment;

(k) the imprisonment of the defendant would entail undue hardship to himself or his dependents;

(l) the defendant is elderly or in poor health;

(m) the defendant did not abuse a public position of responsibility or trust; and

(n) the defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise.

Section 3101, pp. 277-278.

In its "Comment" following its suggested legislation, the Commission states that subsection (2) is "not intended to discourage imposition of prison sentences in appropriate cases, but merely to discourage automatic imposition of such sentences." In its "Working Papers" as to Chapter 31 of the proposed code, the National Commission states the purpose of establishing sentencing criteria:

> The purpose of this provision is to suggest for the proposed Criminal Code, for the guidance of those who will impose sentence, that probation, or some other form of nonincarcerative sentence, should presumptively be the appropirate disposition unless there are affirmative reasons specifically indicating that a prison term is necesary. The ABA Report has recommended the same thing, though it broadened the principle to suggest that every sentence should involve the lease amount of incapacitation of the offender as is compatible with other, necessarily overriding, interests of the public. p. 1268.

The obligation of the trial court to individualize sentences coupled with the delineation of factors to be considered create a right of the petitioner to an appropriate sentence.

In this case, deterrence was considered to the exclusion of all other factors. The Court noted it was "unfortu-

ate that one simply has to be made an example of, not because it is going to do you any good". Moreover, the Court indicated its belief that incarceration would cause "permanent harm" to petitioner." By emphasizing deterrence, the Court chose to ignore the three primarily stated criteria for consideration: the rehabilitative needs of petitioner, the discipline of petitioner and the protection of society. *Williams v. New York*, supra.

Similarly, the requirement of individualized treatment was disregarded as the sentence imposed disrupted petitioner's treatment as a hospitalized mental patient and placed him in the environment of a penal institution.

Evidence was presented at the sentencing hearing and in the presentence report to establish the improbability of any further criminal conduct by petitioner. However, the Court concluded that the "horrendous traffic in LSD and similar narcotics" required the lengthy incarceration of petitioner in order to deter others. By holding that the alleged deterrent factor required incarceration in cases involving sales of drugs, the trial court implied an inflexible sentencing practice in such cases. This practice has been properly condemned. *Williams v. Oklahoma*, 358 U. S. 576, 79 S. Ct. 421, 3 L. Ed. 2d 516 (1959); *Williams v. New York*, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949); *United States v. Daniels*, — F. 2d —, 4 S. S. L. Rptr. 3333 (C. A. 6, 1971). Also see Hall, *Reduction of Criminal Sentences on Appeal*, I, 37 Columbia L. Rev. 521, 549 (1937)

Were it permissible for the court to sentence relying on one factor, to the exclusion of all others, the court must have access to accurate information. *Townsend v. Burke*, 334 U. S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948); *Scott*

v. United States, 419 F. 2d 264 (C. A. D. C. 1969). In relying on the alleged deterrence implicit in lengthy incarceration at the time sentence was imposed and when petitioner's motion was denied; the trial court utterly failed to consider the opinion of two highly qualified psychiatrists active in the area of corrections with wide experience in treating young drug offenders, sellers and users. Despite the fact that the evidence presented was unrefuted, the trial court relied instead on its "feeling" that deterrence was effective in this area of the criminal law.

While it is conceded that deterrence may be a legitimate factor in determining the appropriate sentence after a criminal conviction, the unchallenged statement of the two highly qualified psychiatrists raise substantial doubt as to the accuracy and reliability of the trial court's "feeling" that deterrence works in the area of young drug offenders. To rely on such an unproven "feeling" in imposing a lengthy incarceration, especially when the trial court recognized the lack of necessity to incarcerate petitioner in order to rehabilitate him or to protect the public against further criminal conduct, constitutes a violation of due process of law in performing this most difficult and serious of all judicial acts. This denial of due process is compounded when one considers the trial court's recognition of the strong likelihood of irreparable damage to petitioner in imposing incarceration.

CONCLUSION

An accused is entitled to due process of all stages of a criminal proceeding. At no time are these rights more important than at sentencing following conviction, as the criminal sanction can be effective only when meaningfully applied. For the reasons stated herein, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSASCHUSETTS

Criminal No. 70-155-G

UNITED STATES OF AMERICA,

Appellee,

vs.

STEVEN A. LOZOFF,

Defendant.

Proceedings had in the above entitled cause before the Honorable W. Arthur Garrity, Jr., Judge of said Court, in Court Room No. 2, Federal Building, Boston, Massachusetts, on Monday, April 5, 1971.

(Transcript, pages 32-33)

THE COURT: I will announce my sentence first and then my reasons. I accept the government's recommendation, but will order that the sentences be concurrent rather than consecutive. What that means is that there will be a sentence of five years to be served in this case.

My reasons are principally that the defendant's rehabilitation is a subsidiary consideration for this Court in this type of case. It would be far better for Mr. Lozoff and for his family and for all the persons who are con-

cerned with his welfare to have him rehabilitated, but the need in this type of offense in the Court's opinion is primarily for the deterrence of other persons who are tempted to get involved in this horrendous traffic in LSD and similar narcotics.

Here it is not a matter of a sale or two; it is a matter of a persistent course of conduct over months' duration. It is not a matter of a few dozen pills; it is a matter of literally thousands of LSD pills. I am not so naive as to believe that deterrence is effective when it comes to crimes of passion. You cannot prevent violence, murders, crimes of passion, with sentences to others, but I do feel that passion is not the primary motivation for these narcotics offenses. These are offenses that are deliberate. They are offenses by intelligent people, and, as I said to Mr. Clayton at the time of his sentence, it is unfortunate that someone simply has to be made an example of, not because it is going to do you any good, not because it is going to do defendants any good. In fact, there is a danger that it will do you harm, permanent harm, permanent harm in your life.

On the other had, federal prisons are more enlightened in the matter of treatment and in the matter of care of their prisoners than some state institutions. I am not talking about Massachusetts or any particular state, but there are programs to help inmates in the federal institutions, and I do hope that they are beneficial, or at least minimally damaging, that they minimize the damage that will be done to Mr. Lozoff by this sentence, but it is not Mr. Lozoff that I am thinking about. I feel compelled to think about the young people, or whoever they are, that buy these nar-

cotics and whose lives are ruined comparable to the unfortunate damage that is done to Mr. Lozoff's life.

So that these are difficult cases—intelligent people; people with great potential; but the primary need in this Court's opinion here is concern for the potential customers, and for that reason, the clerk will announce sentence of five years and two years in these two counts, to be served concurrently.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1257

UNITED STATES OF AMERICA,

Appellee,

vs.

STEVEN A. LOZOFF,

Defendant, Appellant.

BEFORE ALDRICH, CHIEF JUDGE,
MCENTEE AND COFFIN, CIRCUIT JUDGES

MEMORADUM AND ORDER

Entered December 9, 1971

This is a troublesome case, not the less so because it is one where judges, who are perforce general practitioners in the broad sense must weigh the views of experts. What it seems to us is that Dr. Zinberg, in his opinion that defendant would be considered a peer hero and would be strengthened in his own view as such, and therefore not deterred, or more relevantly, that others like him would not be deterred, did not take into account that defendant was more a wholesaler than a peer distributor. We, as well

as the District Court, are familiar with the evidence in the *Clayton* case. We cannot believe that the possibility of substantial jail sentences is absent from the minds of such persons. Furthermore, even if it be thought that jail sentences will not deter deviants, or who have not yet become such.

Defendant of course exaggerates when he argues that the Court considered only the factor of deterrence. We consider the District Court's statment a clear, thoughtful one, and find no abuse of discretion.

The order of the District Court is affirmed.

By the Court:

/s/ DANA H. GALLUP
Clerk